A **TENAGA NASIONAL BHD**

v.

KAMARSTONE SDN BHD

B FEDERAL COURT, PUTRAJAYA
ARIFIN ZAKARIA CJ
HASHIM YUSOFF FCJ
ABDULL HAMID EMBONG FCJ
SURIYADI HALIM OMAR FCJ
C JEFFREY TAN FCJ
[CIVIL APPEAL NO: 02-68-2012(A)]
6 NOVEMBER 2013

D ***LIMITATION:*** *Accrual of cause of action - Recovery of debt - Action for recovery of undercharged amount for electricity use - Whether cause of action arose at time when debt could have been recovered by action - Whether date of discovery of shortfall considered date of breach - Whether there was cause of action*

E ***LIMITATION:*** *Acknowledgement of debt - Right of action - Action for recovery of undercharged amount for electricity use - Whether letter seeking indulgence for reduction amounted to acknowledgement of debt - Whether clear and unequivocal acknowledgement - Whether limitation set in*

F ***STATUTORY INTERPRETATION:*** *Retrospective operation - Factors to be considered - Whether statute could be interpreted retrospectively - Intention of Legislature - Licensee Supply Regulations 1990, reg. 11(2)*

G Sometime in 1996, the respondent successfully applied to the appellant for the upgrading of the electricity supply. In January 2003, the appellant discovered that the respondent had been undercharged for a period of 73 months *ie*, from October 1996 to October 2002, due entirely to the application of a wrong meter multiplying constant by the appellant. By reason of the application H of the wrong multiplier, the respondent was undercharged a total of RM581,876.77 ('shortfall'). The appellant issued two demands to the respondent to settle the shortfall. Instead, the respondent, by a letter of 15 September 2003, sought the appellant's indulgence to pay a reduced sum. The appellant rejected the I application and proceeded to file an action to recover the shortfall.

The trial court, in dismissing the claim, held that: (i) s. 29 of the Limitation Act 1953 ('the Act') applied and time only started to run when the mistake in the multiplier was discovered; (ii) by reason of reg. 11(2) of the Licensee Supply Regulations 1990 ('Regulations'), post amendment, which came into effect on 15 December 2002, a retrospective adjustment of a customer's account could not exceed three months; (iii) the cause of action arose after the amendment to reg. 11(2); and (iv) the appellant could not recover a retrospective adjustment of more than three months. The decision was agreed to by the Court of Appeal. Hence, the appellant applied and obtained leave to appeal against the decision on the questions of law, *inter alia*: (i) whether reg. 11(2), post amendment, has retrospective effect; and (ii) whether reg. 11(2) applies to a cause of action that arose before 2002. The appellant submitted that the period of limitation only commenced upon discovery of the mistake and the issuance of the demand. It further submitted that reg. 3 and reg. 11(1-3) of the Regulations, pre-amendment, permitted the appellant to recover the entire shortfall and that reg. 11(2), post amendment, did not apply as the cause of action arose before the amendment. The respondent, on the other hand, submitted that the shortfall was due to the mistake of the appellant and since the respondent was only informed of the shortfall on 13 January 2003, that would be the date of accrual of the cause of action *ie*, after reg. 11(2) had been amended.

Held (allowing appeal with costs)
Per Jeffrey Tan FCJ delivering the judgment of the court:

(1) It is a rule of construction that a statute should not be interpreted retrospectively to impair an existing right or obligation, unless such a result is unavoidable by reason of the language used in the statute. (*Yew Bon Tew & Anor v. Kenderaan Bas Mara*, refd). If it takes away a substantive right, the amendment will not have retrospective effect, save by clear and express words, whereas, if it is procedural, retrospectivity applies unless otherwise stated in the statute concerned. If the Legislature intends an amendment to have retrospective application, it must expressly and clearly say so. But retrospective effect was not manifested in the language of the amendment. Hence, the amendment to reg. 11(2) must be constructed as a prospective provision without any retrospective application. (paras 5 & 7)

(2) A cause of action founded on a contract accrues on the date of its breach, and in the case of a debt, the cause of action arises at the time when the debt could first have been recovered by action. Between October 1996 and October 2002 the appellant had a right, albeit undiscovered, to the shortfall, which was a debt due from the respondent. Although the shortfall was discovered only in January 2003, it remained that during the period between October 1996 and October 2002, the appellant was paid less than the sum calculated on the correct multiplier. Therefore, between October 1996 and October 2002, the appellant had a cause of action. (paras 17 & 18)

(3) The time when the shortfall could first have been recovered would have been when the shortfall was incurred. Therefore the breach was occasioned between October 1996 and October 2002, when there was no cap on any retrospective adjustment of undercharge. Regulation 11(2) pre-amendment, which concerned a charge that would be levied to rectify any discrepancy between the amount of energy consumed and the energy registered by the meter could not apply, as the issue was not about the reading of the respondent's meter. The shortfall was due to the application of a wrong multiplier, and reg. 3(1) permitted the appellant to recover "any charges due … in respect of the supply of electricity". (para 18)

(4) The shortfall was incurred before the amendment to reg. 11(2). The appellant had a substantive right to the shortfall before the amendment to reg. 11(2) which applied, prospectively, to adjustments after it had come into force. However, to cap the shortfall to three months would give retrospective effect to the amendment to reg. 11(2), which could not be so given. Therefore, the court could not agree that the claim could not exceed an adjustment of more than three months. (para 19)

(5) Section 29 of the Act applies only when the action is for relief from the consequences of a mistake. It did not apply where it is a causal mistake or even a material mistake that produced the circumstances from which relief is sought. The instant action was not for "relief from the consequences of a mistake" within the meaning of s. 29(c) of the Act but breach of contract. Consequently, the appellant could not take advantage of s. 29 of the Act to postpone the starting point of the period of limitation to January 2003. (para 26)

(6) There was a clear and unequivocal acknowledgement by the respondent that there was a subsisting debt of RM581,876.77 in the letter dated 15 September 2003. In the circumstances, the right of action of the appellant for the shortfall for the period prior to 26 October 1999 was deemed to have accrued on 15 September 2003. Hence, when the action was filed in 2005, limitation had not set in. (para 30)

Bahasa Malaysia *Translation Of Headnotes*

Pada sekitar tahun 1996, responden berjaya memohon kepada perayu bagi meningkatkan bekalan elektriknya. Pada Januari 2003, perayu mendapati bahawa responden telah dikenakan caj terkurang bagi tempoh 73 bulan iaitu dari Oktober 1996 sehingga Oktober 2002, disebabkan oleh penggunaan salah pemalar pendarab meter oleh perayu. Disebabkan oleh kesalahan pendaraban, responden telah dikenakan caj terkurang sejumlah RM581,876.77 ('kurangan'). Perayu mengeluarkan dua tuntutan kepada responden untuk menyelesaikan kurangan tersebut. Sebaliknya, responden, melalui surat bertarikh 15 September 2003, memohon kepada perayu untuk membayar jumlah yang lebih dikurangkan. Perayu menolak permohonan tersebut dan meneruskan pemfailan tindakan untuk memperolehi semula kurangan tersebut. Mahkamah bicara, dalam menolak tuntutan tersebut, memutuskan bahawa: (i) s. 29 Akta Had Masa 1953 ('Akta') adalah terpakai dan masa hanya bermula apabila kesilapan dalam pendaraban diketahui; (ii) berikutan per. 11(2) Peraturan-Peraturan Bekalan Pemegang Lesen 1990 ('per. 11(2)'), selepas pindaan, yang mula berkuatkuasa pada 15 Disember 2002, pelarasan kebelakangan akaun pelanggan tidak boleh melebihi tiga bulan; (iii) kausa tindakan berbangkit selepas pindaan kepada per. 11(2); dan (iv) perayu tidak boleh memperolehi pelarasan kebelakangan melebihi tiga bulan. Keputusan tersebut dipersetujui oleh Mahkamah Rayuan, justeru, perayu memohon dan memperoleh kebenaran untuk merayu terhadap keputusan tersebut atas persoalan-persoalan undang-undang, antara lain: (i) sama ada per. 11(2), selepas pindaan, mempunyai kesan kebelakangan, dan (ii) sama ada per. 11(2) terpakai kepada kausa tindakan yang timbul sebelum 2002. Perayu menghujahkan bahawa tempoh had masa hanya bermula selepas penemuan kesilapan tersebut selepas tuntutan dikeluarkan. Ia selanjutnya menghujahkan bahawa per. 3 dan per. 11(1-3) Peraturan-Peraturan, selepas pindaan,

membenarkan perayu memperoleh semula keseluruhan kurangan dan bahawa per. 11(2), selepas pindaan, tidak terpakai kerana kausa tindakan berbangkit sebelum pindaan tersebut. Responden sebaliknya, membalas bahawa kurangan tersebut adalah disebabkan oleh kesilapan perayu dan oleh sebab responden hanya diberitahu mengenai kurangan tersebut pada 13 Januari 2003, tarikh tersebut adalah permulaan kausa tindakan iaitu selepas per. 11(2) dipinda.

Diputuskan (membenarkan rayuan dengan kos)
Oleh Jeffrey Tan HMP menyampaikan penghakiman mahkamah:

(1) Adalah peraturan pentafsiran bahawa sesuatu statut tidak sepatutnya ditafsir secara retrospektif sehingga menjejaskan hak atau kewajipan semasa, kecuali keputusan tersebut tidak boleh dielakkan disebabkan oleh bahasa yang digunakan dalam statut tersebut. (*Yew Bon Tew & Anor v. Kenderaan Bas Mara*, dirujuk). Jika ia mengenepikan hak-hak substantif, pindaan tersebut tidak akan mempunyai kesan kebelakangan, kecuali dengan bahasa yang jelas dan terang, manakala, jika ia adalah prosedur, kesan kebelakangan terpakai kecuali dinyatakan sebaliknya dalam statut yang berkenaan. Jika Perundangan meniatkan pindaan tersebut untuk terpakai secara kebelakangan, ia mesti menyatakan demikian dengan jelas dan terang. Tetapi kesan kebelakangan tidak jelas dalam pindaan tersebut. Dengan itu, pindaan kepada per. 11(2) perlu ditafsir sebagai peruntukan prospektif tanpa apa-apa kesan kebelakangan.

(2) Kausa tindakan yang diasaskan atas kontrak bermula pada tarikh kemungkiran, dan dalam kes keberhutangan, kausa tindakan timbul pada masa apabila hutang tersebut boleh diperolehi semula melalui tindakan. Di antara Oktober 1996 dan Oktober 2002, perayu mempunyai hak, walaupun tidak diketahui, kepada kurangan tersebut, yang merupakan hutang tertunggak daripada responden. Walaupun kurangan tersebut hanya diketahui pada Januari 2003, adalah kekal bahawa dalam tempoh di antara Oktober 1996 dan Oktober 2002, perayu dibayar kurang daripada jumlah yang dikira menggunakan pendaraban yang betul. Dengan itu, jelas bahawa di antara Oktober 1996 dan Oktober 2002, perayu mempunyai kausa tindakan.

(3) Masa bagi kurangan tersebut sepatutnya boleh diperolehi adalah apabila kurangan tersebut timbul. Oleh itu, kemungkiran terjadi di antara Oktober 1996 dan Oktober 2002, apabila tidak ada halangan bagi apa-apa pelarasan retrospektif bagi caj terkurang. Peraturan 11(2) selepas pindaan, yang berkaitan dengan caj yang boleh dilevikan untuk memperbetulkan apa-apa percanggahan di antara jumlah tenaga yang digunakan dan tenaga yang didaftarkan oleh meter tidak boleh digunakan, kerana isu tersebut bukan berkenaan dengan pembacaan meter responden. Kurangan tersebut adalah disebabkan oleh penggunaan pendarab yang salah, dan per. 3(1) membenarkan perayu memperoleh semula "apa-apa caj tertunggak ... berkaitan dengan bekalan elektrik".

(4) Kurangan tersebut timbul sebelum pindaan kepada per. 11(2). Perayu mempunyai hak substantif terhadap kurangan tersebut sebelum pindaan kepada per. 11(2) yang terpakai secara prospektif, kepada pelarasan selepas ia mula berkuatkuasa. Walau bagaimanapun, untuk mengehadkan kurangan tersebut kepada tiga bulan akan memberikan kesan kebelakangan terhadap pindaan kepada per. 11(2), yang tidak boleh diberikan. Dengan itu, mahkamah tidak boleh bersetuju bahawa tuntutan tersebut tidak boleh melebihi pelarasan yang lebih dari tiga bulan.

(5) Seksyen 29 Akta hanya terpakai apabila tindakan tersebut adalah untuk relif akibat daripada kesilapan. Ia tidak terpakai di mana terdapat kesilapan bersebab mahupun kesilapan material yang mana relif dipohon akibat daripada keadaan tersebut. Tindakan ini bukan "relief from the consequence of a mistake" dalam maksud s. 29 Akta tetapi kemungkiran kontrak. Dengan itu, perayu tidak boleh mengambil kesempatan daripada s. 29 Akta untuk menangguhkan tarikh permulaan tempoh had masa kepada Januari 2003.

(6) Daripada keseluruhan nada dan bahasa yang digunakan, terdapat perakuan jelas oleh responden bahawa masih ada hutang tertunggak sebanyak RM581,876.77 dalam surat bertarikh 15 September 2003. Dalam keadaan tersebut, hak tindakan perayu terhadap kurangan tersebut bagi tempoh sebelum 26 Oktober 1999 adalah dianggap timbul pada 15 September 2003. Maka, apabila tindakan difailkan dalam tahun 2005, had masa belum bermula.

Case(s) referred to:

Bennett v. White [1910] 2 KB 643 ***(refd)***

Credit Corp (M) Bhd v. Fong Tak Sin [1991] 2 CLJ 871; [1991] 1 CLJ (Rep) 69 SC ***(refd)***

Dato Wira A Nordin Mohd Amin & Ors v. Rajoo Selvappan & Ors [2007] 4 CLJ 421 CA ***(refd)***

Deutsche Morgan Grenfell Group Plc v. Inland Revenue Commissioners and Another [2006] UKHL 49 ***(refd)***

Goh Joon v. Kerajaan Negeri Johor & Ors [1999] 5 CLJ 335 HC ***(refd)***

Government of Malaysia v. Lim Kit Siang & Another Case [1988] 1 CLJ 219; [1988] 1 CLJ (Rep) 63 SC ***(refd)***

Harapan Permai Sdn Bhd v. Sabah Forest Industries Sdn Bhd [2011] 1 CLJ 285 CA ***(refd)***

Ho Kin Man & Ors v. Commissioner of Police [2013] 1 HKC 13 ***(refd)***

Hock Hua Bank Bhd v. Leong Yew Chin [1987] 1 CLJ 126; [1987] CLJ (Rep) 126 SC ***(refd)***

Indah Desa Saujana Corporation Sdn Bhd & Ors v. James Foong Cheng Yuen & Anor [2008] 1 CLJ 651 CA ***(refd)***

Insun Development Sdn Bhd v. Azali Bakar [1996] 2 CLJ 753 SC ***(refd)***

Jackson v. Spittall (1870) LR 5 CP 542 ***(refd)***

Lembaga Kumpulan Wang Simpanan Pekerja v. Ong Lian Chee [2010] 5 CLJ 23 CA ***(refd)***

Letang v. Cooper [1965] 1 QB 232 ***(refd)***

Loh Wai Lian v. SEA Housing Corp Sdn Bhd [1984] 2 CLJ 160; [1984] 1 CLJ (Rep) 223 FC ***(refd)***

Malacca Securities Sdn Bhd v. Loke Yu (No. 2) [1998] 1 LNS 66 HC ***(refd)***

MGG Pillai v. Tan Sri Dato' Vincent Tan Chee Yioun [2002] 3 CLJ 577 FC ***(refd)***

Mohamed Yusop Abdul Wahab v. American Express (M) Sdn Bhd [2002] 7 CLJ 81 HC ***(refd)***

Nasri v. Mesah [1970] 1 LNS 85 ***(refd)***

National Land Finance Co-operative Society Ltd v. Director General of Inland Revenue [1993] 4 CLJ 339 SC ***(refd)***

Newacres Sdn Bhd v. Sri Alam Sdn Bhd [1991] 3 CLJ 2781; [1991] 1 CLJ (Rep) 321 SC ***(refd)***

New Zealand Insurance Co Ltd v. Ong Choon Lin [1992] 1 CLJ 44; [1992] 1 CLJ (Rep) 230 SC ***(refd)***

Phillips-Higgins v. Harper [1954] 1 QB 411 ***(refd)***

Public Textiles Bhd v. Lembaga Letrik Negara [1976] 1 LNS 120 FC ***(refd)***

Puncakdana Sdn Bhd v. Tribunal Tuntutan Pembeli Rumah & Ors [2003] 7 CLJ 350 HC ***(refd)***

Read v. Brown [1889] 22 QBD 128 ***(refd)***

Tenaga Nasional Bhd v. CS Yap Engineering Sdn Bhd [2012] 8 CLJ 933 CA ***(refd)***

Test Claimants in the FII Group Litigation v. Revenue and Customs Comrs (formerly Inland Revenue Comrs) [2012] 2 AC 337 ***(refd)***
The Great Eastern Life Assurance Co Ltd v. Indra Janardhana Menon [2005] 4 CLJ 717 FC ***(refd)***
Trewin v. Flower and Another [1965] NZLR 8 ***(refd)***
Tuan Ishak Ismail v. Leong Hup Holdings Bhd & Other Appeals [1997] 1 CLJ 463 CA ***(refd)***
Yew Bon Tew & Anor v. Kenderaan Bas Mara [1983] 1 CLJ 11; [1983] CLJ (Rep) 56 PC ***(refd)***

Legislation referred to:
Licensee Supply Regulations 1990, regs. 3(1), 11(1), (2), (3)
Limitation Act 1953, ss. 16, 26(2), 27, 29(c)

Limitation Act 1939 [UK], s. 26
Limitation Act 1950, [NZ], s. 28(c)

Other source(s) referred to:
Stroud's Judicial Dictionary, 5th edn, p 378

For the appellant - Steven Thiru (David Mathew with him); M/s Shook Lin & Bok
For the respondent - Loong Chet Siean; M/s Loong & Assocs

Reported by S Barathi

JUDGMENT

Jeffrey Tan FCJ:

[1] The background facts of this appeal against the concurrent findings of the courts below could be summarised as follows.

[2] At all material times, the appellant was a national electricity supplier whilst the respondent was its customer. Sometime in 1996, the respondent successfully applied to the appellant for the supply of electricity to be upgraded from 610 kW to 1,210 kW. On 15 August 1996, the parties entered into a fresh contract for the supply of electricity. It was not in dispute that after the upgrade of the supply, the respondent duly paid all electricity bills without fail, as and when issued. In January 2003, the appellant "discovered" that the respondent had been undercharged for a period of (73) months, that is, from October 1996 to October 2002, due entirely to the application of a wrong meter multiplying

A constant (multiplier) by the appellant. The correct multiplier should have been 100 instead of 50. By reason of the application of the wrong multiplier, the respondent was undercharged a total of RM581,876.77 (shortfall). On 15 November 2002, the multiplier was corrected to 100. Since then, the respondent had settled all
B electricity charges calculated on a multiplier of 100. Meantime, further to the discovery of the wrong multiplier, the appellant issued two demands, on 13 January 2003 and 29 July 2003, to the respondent to settle the shortfall. On 15 September 2003 (see 158AR), the respondent sought indulgence from the appellant to
C pay a reduced sum (RM28,328.40) by ten instalments. But that application was rejected by the appellant who proceeded to file action, on 26 October 2005, to recover the shortfall.

[3] On the issue of limitation, the trial court held (i) that s. 29
D of the Limitation Act 1953 ('Act') applied and that time only started to run when the mistake in the multiplier was discovered; (ii) that by reason of reg. 11(2) of the Licensee Supply Regulations 1990, post amendment, which proviso reads "that the period for any retrospective adjustment shall not exceed three
E months from the date the consumer has been informed about being undercharged or overcharged", which came into effect on 15 December 2002, a retrospective adjustment of a customer's account could not exceed three months; (iii) that the cause of action arose after the amendment to reg. 11(2) (see p. 9 of the
F grounds of the trial court at p. 34 of the appeal record); and (iv) that the appellant could not recover a retrospective adjustment of more than three months. The trial court dismissed the claim. The Court of Appeal agreed with the trial court.

G **[4]** Being aggrieved, the appellant applied and obtained leave on 11 September 2012, to appeal against the decision of the Court of Appeal in respect of the matter decided by the trial court in the exercise of its original jurisdiction, on the following two "questions of law":

H Whether Regulation 11(2) of the Licensee Supply Regulations 1990, post amendment in 2002, has retrospective effect?

Whether Regulation 11(2) of the Licensee Supply Regulations 1990, which came into operation on 15.12.2002 applies to a cause of action that arose before the year 2002?

I

[5] Before us, learned counsel for the appellant submitted that both leave questions should be answered in the negative. Learned counsel for the respondent agreed that reg. 11(2), post amendment, had no retrospective effect. It would seem that both parties knew what should be the answer to the first leave question, which should free us to proceed to the next leave question. Still, we could take this opportunity to uphold that it is indeed a rule of construction that a statute should not be interpreted retrospectively to impair an existing right or obligation, unless such a result is unavoidable by reason of the language used in the statute (*Yew Bon Tew & Anor v. Kenderaan Bas Mara* [1983] 1 CLJ 11; [1983] CLJ (Rep) 56; [1983] MLJ 1 per Lord Brightman, delivering the advice of the board).

[6] In *National Land Finance Co-operative Society Ltd v. Director General of Inland Revenue* [1993] 4 CLJ 339; [1994] 1 MLJ 99, Gunn Chit Tuan CJ (Malaya) said:

> On the retrospective operation of Acts, the presumption is that an enactment is not intended to have a retrospective operation unless a contrary intention appears. In this case, that presumption has been rebutted because s. 1(5) of the Amendment Act states in clear terms that the amendment was intended to be retrospective. But a retrospective operation should not be given to a statute to impair an existing right and it has been stated by the UK Court of Appeal in *EWP Ltd v. Moore* [1992] 1 All ER 880 at p. 891:
>
> > ... that those who have arranged their affairs, as the saying is, in reliance on a decision of these courts which has stood for many years should not find that their plans have been retrospectively upset ...
>
> Moreover, one should avoid a construction that inflicts a detriment and as Lord Brightman has said in *Yew Bon Tew v. Kenderaan Bas Mara* [1983] 1 MLJ 1 at p. 2:
>
> > A statute is retrospective if it takes away or impairs a vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability, in regard to events already past.

[7] If it takes away a substantive right, the amendment will not have retrospective effect, save by clear and express words. If it is procedural, retrospectivity applies unless otherwise stated in the statute concerned (*MGG Pillai v. Tan Sri Dato' Vincent Tan Chee*

Yioun [2002] 3 CLJ 577; [2002] 2 MLJ 673 per Steve Shim CJ (Sabah & Sarawak). If the Legislature intends an amendment to have retrospective application, it must expressly and clearly say so (see *Puncakdana Sdn Bhd v. Tribunal Tuntutan Pembeli Rumah & Ors* [2003] 7 CLJ 350; [2003] 4 MLJ 9 per Md Raus J, as he then was). But retrospective effect was not manifested in the language of the amendment. Hence, the amendment to reg. 11(2) must be constructed as a prospective provision without any retrospective application.

[8] In relation to the second leave question, learned counsel for the appellant submitted as follows. Breach occurred from October 1996 to October 2002. Under s. 29 of the Act, the period of limitation only commenced upon discovery of the mistake and the issuance of the demand on 13 January 2003. Regulation 3 and reg. 11(1), (2), (3) of the Licensee Supply Regulations 1990, pre-amendment, permitted the appellant to recover the entire shortfall. Regulation 11(2), post amendment, did not apply as the cause of action arose before the amendment. The trial court and the Court of Appeal erred when they held that reg. 11(2), post amendment, applied. Under reg. 11(2), pre-amendment, read together with reg. 3 and cl. 11 of the supply contract, the appellant had a substantive right to recover the shortfall, which was not extinguished by reg. 11(2), post amendment.

[9] Learned counsel for the respondent responded as follows. The shortfall was due to the mistake of the appellant. The respondent was only informed on 13 January 2003 of the shortfall. Hitherto, there had not been any breach of the supply contract by the respondent. As such, the cause of action only accrued on 13 January 2003, that is, after reg. 11(2) had been amended. The trial court and the Court of Appeal did not rule that reg. 11(2), post amendment, had retrospective effect. The trial court and the Court of Appeal merely held that the demand, since it was issued on 13 January 2003, was caught by reg. 11(2), post amendment, which came into force on 15 December 2002. Even if reg. 11(2), pre-amendment, were to apply, the appellant could only recover additional charges if the meter failed to accurately register the amount of energy supplied to the consumer or the meter did not accurately record the consumption of electricity due to faulty installation (learned counsel cited *Tenaga Nasional Bhd v. CS Yap Engineering Sdn Bhd* [2012] 8 CLJ 933). Since the shortfall was not due to a faulty meter, the appellant would be worse off under reg. 11(2), pre-amendment.

[10] Both parties could not agree on the date of accrual of the cause of action. While the appellant contended that breach occurred between October 1996 and October 2002, the respondent argued that the cause of action arose on 13 January 2003, after the amendment to reg. 11(2). The second leave question - "Whether reg. 11(2) of the Licensee Supply Regulations 1990, which came into operation on 15 January 2002 applies to a cause of action that arose before the year 2002?" - presupposed that the cause of action arose before 2002. Learned counsel for the appellant contended that breach occurred between October 1996 and October 2002, but that the period of limitation was postponed to 2003 by the operation of s. 29 of the Act. Learned counsel for the appellant drew a distinction between the date of accrual of the cause of action and the period of limitation. But that distinction was not made by the trial court. That we suspect, was due to the mistaken belief of the trial court that it was submitted and so therefore conceded by learned counsel for the appellant that the cause of action arose on 13 January 2003, upon the issuance of the demand (see 34AR), whereas in truth, it was only submitted by learned counsel for the appellant "that the period of limitation only commenced after the discovery of the mistakes and the issuance of the letters dated 13 January 2003 and 29 July 2003" (see 95AR). As a matter of fact, it was never conceded by the appellant before the trial court that the cause of action arose after the amendment to reg. 11(2). But that, with respect, was not spotted by the Court of Appeal, who accepted without query the finding of the trial court, and echoed that the cause of action arose on 13 January 2003 (see p. 4 of the judgment of the Court of Appeal). Given that the finding of the trial court on the date of accrual of action was founded on a fallacy of fact, namely that it was so conceded by the appellant when it was not, we should not rely on that finding of fact without a review of the undisputed facts.

[11] The undercharge occurred between October 1996 and October 2002. The claim of the appellant was based on breach of contract. The appellant contended that breach occurred between October 1996 and October 2002. But it was not in dispute that during that entire period, the respondent duly paid all electricity bills without fail, as and when issued. Flowing from the latter fact, it was contended that there could not have been any breach between October 1996 and October 2002 and that the cause of action could only have arisen thereafter, that is, after the amendment to reg. 11(2) had come into force.

[12] In *Letang v. Cooper* [1965] 1 QB 232, 242-3, Lord Diplock defined a 'cause of action' as "a factual situation the existence of which entitled one person to obtain from the court a remedy against another", which definition was adopted in *Hock Hua Bank Bhd v. Leong Yew Chin* [1987] 1 CLJ 126; [1987] CLJ (Rep) 126; [1987] 1 MLJ 230, where Abdul Hamid Ag LP, as he then was, appended that "there must be a cause of action before a plaintiff can claim a relief in an action". In *Government of Malaysia v. Lim Kit Siang & Another Case* [1988] 1 CLJ 219; [1988] 1 CLJ (Rep) 63; [1988] 2 MLJ 12, 19, the Supreme Court per Salleh Abbas CJ, expounded that to make up 'a cause of action', first, the plaintiff has a right at law or by statute and secondly, the right has been affected by the act of the defendant:

> A cause of action' is a statement of facts alleging that a plaintiff's right, either at law or by statute, has, in some way or another, been adversely affected or prejudiced by the act of a defendant in an action. Lord Diplock in *Letang v. Cooper* [1965] 1 QB 232 at p 242 defined 'a cause of action' to mean 'a factual situation, the existence of which entitles one person to obtain from the court a remedy against another person'. In my view the factual situation spoken of by Lord Diplock must consist of a statement alleging that, first, the respondent/plaintiff has a right either at law or by statute and that, secondly, such right has been affected or prejudiced by the appellant/defendant's act.

[13] But other than that addendum by Salleh Abas CJ, the definition of 'cause of action' as expounded in *Letang v. Cooper* was readily adopted, by the former Supreme Court in *Newacres Sdn Bhd v. Sri Alam Sdn Bhd* [1991] 3 CLJ 2781; [1991] 1 CLJ (Rep) 321; [1991] 3 MLJ 474 and *New Zealand Insurance Co Ltd v. Ong Choon Lin* [1992] 1 CLJ 44; [1992] 1 CLJ (Rep) 230; [1992] 1 MLJ 185, and by the Court of Appeal in *Indah Desa Saujana Corporation Sdn Bhd & Ors v. James Foong Cheng Yuen & Anor* [2008] 1 CLJ 651; [2008] 2 MLJ 11, *Lembaga Kumpulan Wang Simpanan Pekerja v. Ong Lian Chee* [2010] 5 CLJ 23; [2010] 4 MLJ 762, and *Harapan Permai Sdn Bhd v. Sabah Forest Industries Sdn Bhd* [2011] 1 CLJ 285; [2011] 2 MLJ 192.

[14] Other authorities, *inter alia Tuan Ishak Ismail v. Leong Hup Holdings Bhd & Other Appeals* [1997] 1 CLJ 463; [1996] 1 MLJ 661, *Mohamed Yusop Abdul Wahab v. American Express (M) Sdn Bhd* [2002] 7 CLJ 81; [2002] 6 MLJ 507, *Goh Joon v. Kerajaan Negeri Johor & Ors* [1999] 5 CLJ 335; [1998] 7 MLJ 621, applied the

following definition found in *Stroud's Judicial Dictionary* 5th edn. at p. 378: "A 'cause of action' is the entire set of facts that gives rise to an enforceable claim; the phrase comprises every fact which, if traversed, the plaintiff must prove in order to obtain judgment (per Esher MR, *Read v. Brown* [1889] 22 QBD 128; this case was applied in *Bennett v. White* [1910] 2 KB 643)."

[15] In *Nasri v. Mesah* [1970] 1 LNS 85; [1971] 1 MLJ 32, the Federal Court per Gill FJ, as he then was, depicted 'a cause of action' as follows:

> A "cause of action" is the entire set of facts that gives rise to an enforceable claim; the phrase comprises every fact which, if traversed, the plaintiff must prove in order to obtain judgment (per Lord Esher M.R. in *Read v. Brown* [1888] 22 QBD 128 131). In *Reeves v. Butcher* [1891] 2 QB 590 511 Lindley L.J. said:

[16] Gill FJ, then thus enunciated on 'the date of accrual' in the case of a debt:

> This expression, 'cause of action', has been repeatedly the subject of decision, and it has been held, particularly in *Hemp v. Garland* LR 4 QB 509 511, decided in 1843, that **the cause of action arises at the time when the debt could first have been recovered by action**. The right to bring an action may arise on various events; but it has always been held that the statute runs from the earliest time at which an action could be brought.
>
> In *Board of Trade v. Cayzer, Irvine & Co* [1927] AC 610 617. Viscount Dunedin described "cause of action" as that which makes action possible. *Now, what makes possible an action founded on a contract is its breach. In other words, a cause of action founded on a contract accrues on the date of its breach.* Similarly, the right to sue on a contract accrues on its breach. In the case of actions founded on contract, therefore, time runs from breach (per Field J. in *Gibbs v. Guild* 8 QBD 296 302). In the case of actions founded on any other right, time runs from the date on which that right is infringed or there is a threat of its infringement (see *Bolo*'s case LR 57 IA 74). It would seem clear, therefore, that the expressions "the right to sue accrues", "the cause of action accrues" and "the right of action accrues" mean one and the same thing when one speaks of the time from which the period of limitation as prescribed by law should run. (emphasis added)

[17] And *Nasri v. Mesah*, we observe, is still good law (see the Federal Court cases of *Loh Wai Lian v. SEA Housing Corp Sdn Bhd* [1984] 2 CLJ 160; [1984] 1 CLJ (Rep) 223; [1984] 2 MLJ 280, *Insun Development Sdn Bhd v. Azali Bakar* [1996] 2 CLJ 753; [1996] 2 MLJ 188, and *The Great Eastern Life Assurance Co Ltd v. Indra Janardhana Menon* [2005] 4 CLJ 717; [2006] 2 MLJ 209, which followed *Nasri v. Mesah*) which we readily endorse. A cause of action founded on a contract accrues on the date of its breach, and in the case of a debt, the cause of action arises at the time when the debt could first have been recovered by action.

[18] Between October 1996 and October 2002 the appellant had a right, *albeit* undiscovered, to the shortfall, which was a debt due from the respondent. Except that the shortfall was not discovered until years later, in January 2003. Nevertheless, it remained that between October 1996 and October 2002, the appellant was paid less than the sum calculated on the correct multiplier. The shortfall was incurred during that period. "In a contract for the payment of money the breach occurs when there is a failure to pay the sum promised. This is logical as the meaning of 'cause of action' is the act on the part of the defendant which gives the plaintiff his cause of complaint (see *Jackson v. Spittall* (1870) LR 5 CP 542). The failure to pay will be the cause of complaint" (*Malacca Securities Sdn Bhd v. Loke Yu (No. 2)* [1998] 1 LNS 66; [1999] 6 MLJ 112, 127, per Augustine Paul J, as he then was). The shortfall was the result of short payment. Since the shortfall was incurred during that period, it should follow that the short payment was occasioned during that period. If action had been taken then, that is, when the shortfall occurred, the facts were already in existence, *albeit* unknown, which would have entitled the appellant to succeed. Clearly, therefore, between October 1996 and October 2002, the appellant had a cause of action. Indeed, in *Public Textiles Bhd v. Lembaga Letrik Negara* [1976] 1 LNS 120; [1976] 2 MLJ 58, where the consumer was undercharged by reason of a mistake in the multiplication factor but limitation was not an issue, the electricity supplier obtained judgment to recover the full undercharge from the commencement of the supply. And in the instant case, the time when the shortfall could first have been recovered would have been when the shortfall was incurred. We therefore agree that breach was occasioned between October 1996 and October 2002, when there was no cap on any retrospective adjustment of undercharge. With respect, reg. 11(2) of the Licensee Supply Regulations 1990, pre-amendment, which

concerned a charge that would be levied to rectify any discrepancy between the amount of energy consumed and the energy registered by the meter, could not apply, as the issue was not about the reading of the respondent's meter. The shortfall was due to the application of a wrong multiplier, and reg. 3(1) permitted (still permits) the appellant to recover "any charges due ... in respect of the supply of electricity".

[19] We have given our utmost consideration to the fact that the respondent was entirely faultless and to the argument that the demand for payment of the shortfall was made after the amendment to reg. 11(2) had come into force. We would not say that we are not moved by the predicament foisted by the appellant on the respondent. But the fact of the matter is that the shortfall was incurred before the amendment to reg. 11(2). The appellant had a substantive right to the shortfall before the amendment to reg. 11(2) which applied, prospectively, to adjustments for the months thenceforth, that is, after it had come into force. But to cap the shortfall to three months would give retrospective effect to the amendment to reg. 11(2), which could not be so given. We could not therefore agree that the claim could not exceed an adjustment of more than three months.

[20] Action however was filed on 26 October 2005, that is, outside the period of limitation with respect to the shortfall incurred for the period prior to 26 October 1999. It was contended that the period of limitation was postponed by s. 29 of the Act, which reads:

> Where, in the case of any action for which a period of limitation is prescribed by this Act, either:
>
> (a) the action is based upon the fraud of the defendant or his agent or of any person through whom he claims or his agent; or
>
> (b) the right of action is concealed by the fraud of any such person as aforesaid; or
>
> (c) the action is for relief from the consequences of a mistake,
>
> the period of limitation shall not begin to run until the plaintiff has discovered the fraud or the mistake, as the case may be, or could with reasonable diligence have discovered it:

A Provided that nothing in this section shall enable any action to be brought to recover, or enforce any charge against, or set aside any transaction affecting, any property which:

(i) in the case of fraud, has been purchased for valuable consideration by a person who was not a party to the fraud and did not at the time of the purchase know or have reason to believe that any fraud had been committed; or

(ii) in the case of mistake, has been purchased for valuable consideration, subsequently to the transaction in which the mistake was made, by a person who did not know or have reason to believe that the mistake had been made.

[21] Under s. 29 of the Act, only where (a) the action is based upon the fraud of the defendant or his agent or of any person through whom he claims or his agent; or (b) the right of action is concealed by the fraud of any such person as aforesaid; or (c) the action is for relief from the consequences of a mistake, could "the period of limitation … not begin to run until the plaintiff has discovered the fraud or the mistake, as the case may be, or could with reasonable diligence have discovered it". But for s. 29(c) of the Act to operate in the instant case, the action of the appellant must be for relief from the consequences of a mistake (*Dato Wira A Nordin Mohd Amin & Ors v. Rajoo Selvappan & Ors* [2007] 4 CLJ 421; [2007] 5 MLJ 297 per James Foong JCA, as he then was, delivering judgment of the court). "In order to come within that description a plaintiff must assert and claim, by action, a legal or equitable right to relief from the consequences of a mistake and the relief which he claims must be such as the court is empowered to grant. In such an action, if his claim would otherwise be barred by the statute and he proves that the mistake was not discovered and could not with reasonable diligence have been discovered until a later date than that on which the cause of action arose, the period of limitation does not begin until the later date. Such a postponement is, however, an incident attached by operation of law, collateral to the substantive cause of action, and not the product of an independent cause of action" (*Trewin v. Flower and Another* [1965] NZLR 8 per Wilson J, where it was held that the action brought by a mortgagee against his mortgagor to enforce payment of interest due but unpaid in consequence of a mistake was not one for "relief from the consequences of a mistake" for the purposes of s. 28(c) of the Limitation Act 1950, which is in *pari materia* with s. 29(c) of the Act).

[22] In *Phillips-Higgins v. Harper* [1954] 1 QB 411, which would become a leading authority, Pearson J said the following in connection with s. 26 of the English Limitation Act 1939, which is in *pari materia* with s. 29 of the Act:

> The right of action is for relief from the consequences of a mistake. It seems to me that this wording is carefully chosen to indicate a class of actions where a mistake has been made which has had certain consequences and the plaintiff seeks to be relieved from those consequences. Familiar examples are, first, money paid in consequence of a mistake: in such a case the mistake is made, in consequence of the mistake the money is paid, and the action is to recover that money back. Secondly, there may be a contract entered into in consequence of a mistake, and the action is to obtain the rescission or, in some cases, the rectification of such a contract. Thirdly, there may be an account settled in consequence of mistakes; if the mistakes are sufficiently serious there can be a reopening of the account.
>
> In my opinion, the mere operation of the Limitation Act unless excluded by this section is not a relevant consequence for the purpose of the section. If it were, then any concealment of a right of action from the plaintiff by a mistake would be intended to be covered by this section and the provision (b) in respect of fraud should have been applied to mistake also. Moreover, I think that it is right to say that if there would be no consequence except the operation of the Limitation Act, and the operation of the Limitation Act is excluded, then there is no consequence at all. In this case the mistake, in my judgment, has had no relevant consequence for the purposes of this section. As the statement of claim shows, the plaintiff's claim is to recover moneys due to her under a contract, and the cause of action is the same as if she had sued for each unpaid balance on its due date. By reason of the mistake she failed to realize that the balance was due to her and by that mistake the right of action was concealed from her. But that is not sufficient. Probably provision (c) applies only where the mistake is an essential ingredient of the cause of action, so that the statement of claim sets out, or should set out, the mistake and its consequences and pray for relief from those consequences. In this case the statement of claim sets out that sums became due and that only a smaller amount of £x has been paid, and the prayer is for an account to ascertain the sums still due and for payment of them when so ascertained. This action is not for relief from the consequences of a mistake within the meaning of section 26.

A No doubt there are certain anomalies which result. As Mr. Wilson pointed out, it is odd that a person who has by mistake paid too much can take advantage of the section whereas a person who has by mistake received too little and made no protest cannot take advantage of the section. There may be other anomalies also. But, in my judgment, the carefully chosen wording of the provision (c) must have its proper effect notwithstanding any resulting anomalies. No doubt it was intended to be a narrow provision, because any wider provision would have opened too wide a door of escape from the general principle of limitation by six years' lapse of time, which is, of course, a reasonable and normally salutary principle, as Mr. Platts-Mills demonstrated by reference to this case, where the parties' memories have grown dim as to long past events and possibly some documents which might have been material have in the course of time perished.

[23] Lord Scott in *Deutsche Morgan Grenfell Group Plc v. Inland Revenue Commissioners and Another* [2006] UKHL 49 agreed with Pearson J:

It is common ground that DMG has a cause of action in tort for compensation for the loss caused by the breach of Community law found by the European Court of Justice in the *Metallgesellschaft/ Hoechst* case to be inherent in the ACT tax regime. It is also common ground that for Limitation Act 1980 purposes time began to run when each payment of ACT was made. The details of the payments are set out in para 111 of Lord Walker's opinion. Section 32(1)(c) applies where an action is brought "for relief from the consequences of a mistake". In *Phillips-Higgins v. Harper* [1954] 1 QB 411 Pearson J expressed the view, at p 419, that section 26(c) of the Limitation Act 1939 (the statutory predecessor of section 32(1)(c) of the 1980 Act) "applies only where the mistake is an essential ingredient of the cause of action ..." If it is right, as I think it is, that when the ACT was paid by DMG the ACT was due, DMG's cause of action is an action for compensation for tort. It is not, in my opinion, an action for restitution based on the payment of money under a mistake. An allegation of a mistake but for which the ACT would not have been paid is not an essential ingredient in DMG's cause of action.

[24] *Phillips-Higgins v. Harper* recently found approval with the Supreme Court, in *Test Claimants in the FII Group Litigation v. Revenue and Customs Comrs (formerly Inland Revenue Comrs)* [2012] 2 AC 337; [2012] UKSC 19.

[25] The mistake must be an essential ingredient of the cause of action. In *Credit Corp (M) Bhd v. Fong Tak Sin* [1991] 2 CLJ 871; [1991] 1 CLJ (Rep) 69; [1991] 1 MLJ 409, the respondent, a taxi driver, was injured in an accident between his taxi and another motor vehicle on 18 June 1979. On 16 June 1984 the respondent took out a writ claiming special and general damages. Subsequently, on 15 August 1984, solicitors for the respondents were informed that the appellant claimed to be the owner of the vehicle. Solicitors for the respondents applied four years later to add the appellant as the third defendant. The issue before the learned judge was whether the respondent's application was barred by limitation. The trial judge held that time did not run against the respondent until the date he was aware that the appellant was the registered owner of the vehicle, that is, on 15 August 1984. In allowing the appeal, the former Supreme Court per Hashim Yeop Sani CJ (Malaya), delivering the judgment of the court, endorsed *Phillip-Higgins v. Harper*, and said:

> By virtue of s. 29 of our Act in cases of fraud or mistake the period of limitation is postponed and does not begin to run until the plaintiff has discovered the fraud or the mistake, as the case may be, or could with reasonable diligence have discovered it.
>
> A perusal of the appeal record here shows that there is a reference to s. 29 in the submission of counsel for the respondent appearing in the notes of proceedings but this section is not however referred to in the grounds of judgment. The line of argument before the learned judge was probably that the respondent's mistake was caused by the negative response from the RIMV. But s. 29 of the Limitation Act 1953 cannot apply to this case for the following reasons.
>
> Section 29 of our Limitation Act 1953 is in *pari materia* with s. 26 of the old English Limitation Act 1939 and the relevant part reads as follows:
>
> ...
>
> This provision was inserted to protect a plaintiff who was ignorant of his right of action in the special case of fraudulent concealment, and to overcome the difficulty that time would otherwise be running against him, unknown to him. As a general rule as stated in the notes in 24 *Halsbury's Statutes of England and Wales* (4th Ed) to s. 32 of the English Limitation Act 1980 (which is in *pari materia* with s. 26 of the English Limitation Act

1939 which is in turn in *pari materia* with s. 29 of our Limitation Act 1953) it is stated that s. 29(1)(c) applied 'to an action at common law to recover money paid under a mistake of fact or to an analogous claim in equity for money paid under a mistake of act or law.

The provision of s. 29(c) of our Limitation Act 1953 is therefore only applicable where the mistake is an essential ingredient of the cause of action. This is explained by Pearson J in *Phillips-Higgins v. Harper* [1954] 1 QB 411 at p 418 when considering the corresponding section in the English law:

> What, then, is the meaning of provision (c)? The right of action is for relief from the consequences of a mistake. It seems to me that this wording is carefully chosen to indicate a class of actions where a mistake has been made which has had certain consequences and the plaintiff seeks to be relieved from those consequences. Familiar examples are, first, money paid in consequences of a mistake: in such a case the mistake is made, in consequence of the mistake the money is paid, and the action is to recover that money back. Secondly, there may be a contract entered into in consequence of a mistake, and the action is to obtain the rescission or, in some cases, the rectification of such a contract. Thirdly, there may be an account settled in consequence of mistakes; if the mistakes are sufficiently serious there can be a reopening of the account.

In *RB Policies at Lloyd's v. Butler* [1950] 1 KB 76 (refd) Streatfield J explained the rationale of s. 26 of the English Act as follows:

> This section was inserted to protect a plaintiff who was ignorant of his right of action in the special case of fraudulent concealment, and to overcome the difficulty that time would otherwise have been running against him, unknown to himself. But for the section, time would have run against him from the accrual of his right of action, for it is to be noted that the section, even in the case of fraudulent concealment, does not say that the cause of action shall not accrue until the fraud is discovered, but simply that 'time shall not begin to run' until that event.
>
> It is to be noted that s. 26 is the only provision in the Limitation Act 1939, in which a special exception of that nature is made. Nowhere is it to be found that where a person, who otherwise has a perfect cause of action, cannot

> pursue it because the defendant is unknown, time does not run. And it seems to me, therefore, that *prima facie* as soon as there is a cause of action (as there clearly was in the present case the moment the motor car was stolen) time begins to run notwithstanding the fact that the plaintiff is ignorant of the identity of the defendant. (emphasis added)

RB Policies at Lloyd's v. Butler [1950] 1 KB 76 dealt with an action for conversion. A car was stolen in 1940 and the identity of the thief was not known and the car was not traced until 1947. The plaintiffs (successors in title to the owner of the car) then brought an action against the defendant, an innocent purchaser for value of the car, for its recovery. The defendant relied on the Limitation Act 1939. Streatfield J began his judgment by asking the question 'When does a cause of action accrue?' He said at p. 79:

> When the thief, whoever he was in the present case, stole the motor car in 1940 he clearly converted it to his own use, and apart from the question of prosecution for the felony, if he had then been known, an action could undoubtedly have been brought against him for conversion of the car. There being thus a cause of action, I have to determine whether it is necessary that there should be an actual known and available defendant to such an action before it can be said that the cause of action has accrued within the meaning of s. 2, sub-s. I, and s. 3, sub-s. I, of the Limitation Act.
>
> Various definitions have been made of an accrual of a cause of action, and I start with the proposition in 20 *Halsbury's Laws of England* (2nd Ed) p. 618, which has been submitted by Mr Atkinson: 'A cause of action cannot 'accrue unless there be a person in existence capable' of suing and another person in existence who can be sued.' In the present case there was, of course, a person capable of suing, but was there another in existence who could be sued?
>
> Is it to be said that because a person is, possibly only temporarily, untraceable, he is not in existence, or cannot be sued? Whoever the thief was, if he had been traceable, he could have been sued: so I doubt whether it can be said that there was no person in existence, for the purpose of that definition, who could have been sued.

A Knowledge on the part of the respondent as to the identity of the appellant is irrelevant as such requirement is not provided for in our statute of limitation. This is the second error made by the learned judge.

B **[26]** Section 29(c) of the Act applies only when the action is for relief from the consequences of a mistake. It does not apply where it is a causal mistake or even a material mistake that produced the circumstances from which relief is sought. In the instant case, the essential ingredient of the cause of action brought by the appellant was not mistake. As submitted by learned counsel C for the appellant, the cause of action was breach of contract. "'Mistake' was relied upon solely as an excuse for not having brought proceedings within time, and not as an essential ingredient of the cause of action" (see *Ho Kin Man & Ors v. Commissioner of Police* [2013] 1 HKC 13 per Deputy Judge Saunders). Like D *Trewin v. Flower and Another*, where it was held that the action brought by a mortgagee against his mortgagor to enforce payment of interest due but unpaid in consequence of a mistake was not one for "relief from the consequences of a mistake", the instant action was also not for "relief from the consequences of a E mistake" within the meaning of s. 29(c) of the Act. Consequently, the appellant could not take advantage of s. 29 of the Act to postpone the starting point of the period of limitation to January 2003.

F **[27]** It was contended that the appellant could rely on s. 26(2) of the Act, which reads:

> (2) Where any right of action has accrued to recover any debt or other liquidated pecuniary claim, or any claim to the personal estate of a deceased person or to any share or G interest therein, and the person liable or accountable therefor acknowledges the claim or makes any payment in respect thereof, the right shall be deemed to have accrued on and not before the date of the acknowledgment or the last payment:
>
> H Provided that a payment of a part of the rent or interest due at any time shall not extend the period for claiming the remainder of the rent or interest then due, but any payment of interest shall have effect, for the purposes of this subsection only, as if it were a payment in respect of the I principal debt.

[28] Section 27 of the Act provides that the aforesaid acknowledgment must be in writing and duly signed by the person making it.

> (1) Every such acknowledgment as is referred to in section 26 or in the proviso to section 16 of this Act shall be in writing and signed by the person making the acknowledgment.
>
> (2) Any such acknowledgment or payment as is referred to in section 26 or the proviso to section 16 of this Act may be made by the agent of the person by whom it is required to be made under that section, and shall be made to the person, or to an agent of the person, whose title or claim is being acknowledged or, as the case may be, in respect of whose claim the payment is being made.

[29] In our foregoing summary of the background facts, we related that the respondent applied to the appellant to pay RM28,328.40 by ten instalments. That application was made by the following letter dated for 15 September 2003:

KAMARSTONE SDN BHD

Date: 15.09.2003

TNB Pengurus Kawasan
TNB Distribution Sdn. Bhd.
Wisma TNB, Jalan Lahat,
30200 Ipoh,
Perak Darul Ridzuan.

Dear Sir,

Re: Bil Debit Dated 29.07.2003 – Account No. 0210 00115736

We refer to the above which came as a big financial to us. Since then, the directors sleepless nights as they could not find a way out without either selling the business or winding up the company. We have no collateral even to back our borrowings or any means to repay loan with the present tight cash flow.

Our executives and our labour force were not told of this unexpected expenses item lest they may lose their morale and confidence. By closing down, the livelihood of the staff is sympathetically affected. It is so damaging to us just because a simple technical error. The error goes as far as interfering with

A the cost of our overhead from which we devise our selling price per piece of marble slap. It this extra cost were introduced, it means we were selling at a loss for every piece. It definitely affects our sales strategy.

B But we had to face the truth for we have no means to pay the gigantic expenses amounting to RM581,876.77. To save us from the net of winding up and staff retrenchment, we beg for your understanding and waiver of the said amount.

C We hope you will consider out reasons for making this request :- Our Company had a substantial carried forward losses prior to 1998. From 1998 till 2000 we incurred losses to the tune of RM394,000.00. All these losses appeared in our audited accounts. Yet, we struggled to save face and protect our workers from redundancy.

D We have operated as a small humble factory and it remains so till today. We could have expanded it should our income warrant it but the day did not come considering the competitiveness involved in this kind of industry where pricecutting becomes a culture. In fact, from 1997 onwards we accommodated to the rising overhead cost by reducing our usual 2 working shifts to a

E single shift. It was a tough decision yet inevitable.

This is the story of our Company as the audited accounts would relate. However, we are willing to settle the additional charge imposed from 13.05.2002 to 14.10.2002 for RM28,328.40 by

F 10 monthly instalment.

Our hope lies in your waiver and so is the fate of our workers. Thank you for your wisdom and understanding.

Yours faithfully,

G KAMARSTONE SDN BHD (168949-T)
Sgd.

....
Director

H **[30]** To put it in its proper context, the aforesaid letter was the response of the respondent to the demands by the appellant for payment of RM581,876.77. Evidently, in the aforesaid letter, the respondent did not deny liability. Also, the respondent did not deny that a "gigantic expense ... of RM581,876.77" was incurred.

I

But rather, from the totality of the tone and language used, there was a clear and unequivocal acknowledgement by the respondent that there was a subsisting debt of RM581,876.77, the acknowledgement of which was further borne out by the plea of the respondent to the appellant to waive the shortfall. We could accept that the plea of indigence would have been made in good faith. But unfortunately for the respondent, because of the acknowledgement, the right of action of the appellant for the shortfall for the period prior to 26 October 1999, was thereby deemed to have accrued on 15 September 2003. When action was filed in 2005, limitation had not set in.

[31] For the aforesaid reasons, we answer both leave questions in the negative, and unanimously allow this appeal with costs.